

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20054**

In the Matter of	)	
	)	
Federal-State Joint Board on Universal	)	CC Docket No. 96-45
Service	)	
	)	
Unbundled Access to Network Elements	)	CC Docket No. 04-313
	)	
Review of the Section 251 Unbundling	)	
Obligations of Incumbent Local Exchange	)	CC Docket No. 01-338
Carriers	)	

**EMERGENCY REQUEST FOR ACCESS TO CLEC DATA  
RELEVANT TO THE IMPAIRMENT INQUIRY**

BellSouth Corporation, SBC Communications Inc., and the Verizon telephone companies (collectively, the “ILECs”) hereby request access to information in the possession of the CLECs that is directly relevant to the impairment inquiry.

On September 8, 2004, the Association for Local Telecommunications Services (“ALTS”) filed a request for access to highly confidential ILEC materials so that CLECs may use that information in this proceeding. The ILECs agree with ALTS that the Commission should have all relevant information before it as it undertakes the important task of determining in which markets, if any, CLECs are “impaired” without access to specific ILEC network elements. In ALTS’s words, the “public interest heavily favors” requiring disclosures necessary to ensure that the record is not “incomplete and one-sided.”<sup>1</sup> Only by being armed with full information can the Commission make a legally

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<sup>1</sup> ALTS Request at 4.

sustainable determination on impairment, put this dispute behind it at last, and move on to other critical issues facing the industry.

ALTS, however, is incorrect when it suggests that providing CLECs with access to ILEC proprietary information regarding the number of access lines per wire center would somehow level the playing field with respect to access to information relevant to the impairment inquiry. On the contrary, the CLECs have unique access to other information that is equally, if not more, relevant to the impairment inquiry than access-line density information. Among other things, they know where they have deployed fiber networks and packet switches, where they have provisioned their own loops, where they have relied upon third-party facilities, and where they have used special access facilities to provide service. As discussed below, these materials bear directly on the impairment inquiry this Commission is required to undertake. The Commission should not permit CLECs to hide these important facts, nor should the Commission allow ALTS, its members, and other CLECs access to the highly confidential ILEC materials without requiring the CLECs to supply the relevant information within their control.

Accordingly, if the Commission grants ALTS's request, it must also grant this ILEC request and require ALTS, and all its members as well as any other CLECs<sup>2</sup> that have requested access to ILEC data to provide specific facts (listed below) in their possession that are directly relevant to this Commission's inquiry. At a minimum, the Commission should require all CLECs to make available to ILECs, for use in this

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<sup>2</sup> On September 10, AT&T filed a letter supporting ALTS's request and seeking access to the same materials. CompTel/ASCENT, Eschelon Telecom, and Supra have also made filings in support of ALTS's request.

proceeding, all the materials in the categories enumerated below that they provided in discovery in the state proceedings authorized by the *Triennial Review Order*.<sup>3</sup>

**1. CLECs Have In Their Possession Information That Is Directly Relevant to the Impairment Inquiry Required by the Courts.** There can be no legitimate dispute that CLECs have information that bears upon their claims that they would be “impaired,” as that term has been authoritatively construed by the Supreme Court and the D.C. Circuit, without access to specific ILEC facilities in particular categories of markets.

First, under the standard established by the Supreme Court and the D.C. Circuit, there can be no impairment if an efficient competitor can provide service without relying upon UNEs. As the CLECs acknowledged before the D.C. Circuit, the requirement that, in determining impairment, the Commission look to an efficient CLEC “is inherent in the [Commission’s] impairment analysis.”<sup>4</sup> Moreover, the Commission itself has stated that focusing on “individual requesting carriers” and their “particular business strateg[ies]” would improperly “reward those carriers that are less efficient.”<sup>5</sup>

Accordingly, when there is evidence that a competitor *has* deployed, for instance, its own high-capacity loops or transport in a particular market, that fact is directly relevant to the impairment question that this Commission must resolve. To put the point

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<sup>3</sup> See Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) (“*Triennial Review Order*”), *vacated in part and remanded*, *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”), *petitions for cert. pending*, *NARUC v. United States Telecom Ass’n*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004).

<sup>4</sup> See Letter from David W. Carpenter, Counsel for AT&T Corp., to Mark J. Langer, Clerk, United States Court of Appeals for the District of Columbia Circuit, Nos. 00-1012 (filed Jan. 29, 2004).

<sup>5</sup> *Triennial Review Order*, 18 FCC Rcd at 17056, ¶ 115.

in the D.C. Circuit's terms, that fact is relevant to whether the facility at issue is "[s]uitable" for competitive supply in that particular market and in other markets with analogous characteristics.<sup>6</sup> And, of course, it is competitors, not the ILECs, that have complete information demonstrating where they have deployed their own facilities or relied upon third-party facilities.

Similarly, under the Supreme Court and D.C. Circuit decisions, evidence that CLECs are competing using tariffed special access services in a particular market is directly relevant to CLEC claims of impairment in that market and in analogous markets. The Supreme Court's decision in *Iowa Utilities* holds that, regardless of any difference in cost, CLECs are not impaired within the meaning of section 251(d)(2) if they can provide service without access to UNEs.<sup>7</sup> In accord with that holding, the D.C. Circuit stressed in *USTA II* that the Commission "*must* consider" both "the availability of tariffed ILEC special access services" and "the availability of services for sale under § 251(c)(4)" when "determining whether would-be entrants are impaired."<sup>8</sup> Again, each CLEC knows best when it has provided service to its customers using tariffed services. The CLECs are thus in possession of the information necessary to respond to this aspect of the D.C. Circuit's holding.

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<sup>6</sup> *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

<sup>7</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 389-90 & n.11 (1999), *decision on remand*, *Iowa Utils Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part sub nom. Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

<sup>8</sup> *USTA II*, 359 F.3d at 557; *see id.* ("What the Commission may not do is compare unbundling only to self-provisioning or third-party provisioning, arbitrarily excluding alternatives offered by the ILECs.").

**2. If the Commission Requires Access to Highly Confidential ILEC Information, It Should Also Order CLECs To Provide the Facts in Their Possession That Are Relevant to Impairment.** The Commission has the power to require CLECs to provide the facts within their control.<sup>9</sup> Because information as to facilities deployment, reliance on third-party facilities, and use of special access is directly relevant to impairment, the Commission would have been amply justified in requiring ALTS and its supporters to provide that information even absent a request for access to proprietary ILEC information. The fact that such a request has been made, however, makes this result even plainer because, as ALTS acknowledges, *all* parties should have “access to the data that enable them to ‘conduct [their] own [impairment] analysis.’”<sup>10</sup>

ALTS and its supporters are requesting access to highly confidential, competitively sensitive information: line-count information at the wire center level.<sup>11</sup> This information has been provided pursuant to an *Interim Protective Order*<sup>12</sup> in this

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<sup>9</sup> See, e.g., *California Water & Tel. Co.*, 23 F.C.C.2d 840, 843, ¶¶ 6-7 (1970) (“Upon careful review of all the petitioners’ contentions, we see no legal or equitable bar to our extension of discovery rights to this proceeding. We believe it falls well within our broad discretion in formulating appropriate procedures in this case to extend discovery rights to the parties and doing so will conduce to effective and expeditious resolution of the issues. No party is prejudiced thereby, misled, or denied any procedural rights to which they are otherwise entitled.”).

<sup>10</sup> ALTS Request at 2.

<sup>11</sup> This material is competitively sensitive because disclosure of line counts by wire center would allow competitors to identify the local areas with the greatest concentration of customers, permitting them to target their marketing efforts and their deployment of facilities to the most lucrative parts of the reporting carrier’s customer base. In an industry characterized by economies of scale, the ability to identify the areas with the highest customer density gives a competitor an invaluable advantage. This information would allow a competitor to make the greatest inroads in the shortest time, at the expense of the carrier providing the information.

<sup>12</sup> Interim Protective Order, *Federal-State Joint Board on Universal Service*, 15 FCC Rcd 10183 (2000) (“*Interim Protective Order*”).

Commission's *Universal Services* docket. As ALTS notes, the Commission's order authorized the use of line-count information "only for the purpose of reviewing the underlying information and verifying the results of the forward-looking cost mechanism" in that proceeding.<sup>13</sup> The subsequent orders that ALTS cites likewise related to the use of this material to determine costs for universal-service purposes.<sup>14</sup>

For the CLECs to insist on access to such sensitive ILEC materials without providing access to the directly relevant materials in their possession would result in the very kind of "one-sided" and "incomplete" record that ALTS claims it is trying to avoid.<sup>15</sup> Indeed, it would put the Commission in the untenable position of having to evaluate claims without the information necessary to make informed evaluations. To avoid that result, the Commission should not grant the CLECs the right to use the highly confidential ILEC material to which ALTS seeks access, while at the same time allowing those same CLECs to withhold information within their possession that goes to the heart of the impairment inquiry.<sup>16</sup> Instead, just as in a civil case, the Commission should grant

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<sup>13</sup> *Interim Protective Order*, 15 FCC Rcd at 10187, ¶ 11.

<sup>14</sup> See Order, *Access Charge Reform*, 17 FCC Rcd 8252, 8254, ¶ 5 (2002) (granting NASUCA request to use this information to "address[] the appropriate amount of support under the interstate access support mechanism"); Order, *Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, 16 FCC Rcd 21356, 21357, ¶ 3 (noting that NASUCA sought information only "to produce loop cost studies and to evaluate the data and cost studies submitted by other carriers" in determining SLC caps).

<sup>15</sup> ALTS Request at 4.

<sup>16</sup> There is an additional problem with ALTS's request. While information concerning line counts at the wire-center level may be relevant to assessing whether CLECs are impaired without access to unbundled high capacity loops and transport, relying upon such information from the *Universal Service* proceeding to make such an assessment is problematic. This is because primary rate interface lines ("PRI") are counted as only 5 DS0 equivalent lines for USF purposes, even though a PRI consists of 24 DS0 equivalent

this motion to ensure that the parties have symmetrical rights to obtain and use relevant information that their adversaries will not freely disclose.<sup>17</sup>

Moreover, even beyond the fact that the extent of CLEC use of alternative sources of high-capacity facilities is directly relevant to the impairment inquiry, that material should also be disclosed because it would be beneficial in assessing whatever results ALTS proffers based on access to wire-center line counts. ALTS and its supporters apparently seek to use the line-count information to try to determine whether there is a “reliable correlation between interoffice transport impairment and access line density.”<sup>18</sup> Evaluation of such analysis of that issue would be more robust if ILECs have access to complete information regarding where CLECs have deployed transport and high-capacity loops. To use a simple example, suppose ALTS claims that CLECs are impaired without access to transport and high-capacity loop facilities in wire centers with fewer than 15,000 lines. In that circumstance, ILECs should be able to obtain complete data regarding whether and where CLECs have deployed those facilities in order to evaluate and respond to any such arguments. To deprive ILECs of access to such materials would be unfair and result in this Commission receiving skewed and unreliable information. Indeed, in the very orders that ALTS cites, the Commission previously authorized access

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lines for ARMIS reporting purposes. Thus, line count data from the *Universal Service* proceeding understates actual line count levels.

<sup>17</sup>See Fed. R. Civ. P. 34(a) (permitting discovery requests by “[a]ny party . . . on any other party”).

<sup>18</sup> ALTS Request at 4.

to proprietary information precisely so that commenting parties could assess and evaluate the data provided by other parties.<sup>19</sup>

**3. The Commission Should Require ALTS, Its Members, and Other CLECs To Provide Specific Relevant Information and Should Specify That Significant Consequences Will Result from Failure To Do So.** To avoid any

confusion, the Commission should make plain the types of information that the parties that seek access to ILEC data – that is, ALTS, its members, and all other parties that have supported ALTS’s request (as well as the members, subsidiaries and affiliates of those parties) – must provide to the Commission and, subject to a protective order, to ILECs in order to permit the Commission to have a full factual basis for its impairment inquiry.

That material should include:

- Complete information regarding their deployment of facilities, including maps showing the locations of their fiber networks, the buildings they have lit, and the packet switches that can be used for local voice services, including VoIP;
- Complete information (including maps) regarding their use of third-party facilities to provide local services;
- Complete information (including maps) concerning their use of special access to provide service to their customers, including location, service type and identification of customer (at least by description) being served through such service;
- Complete information on where, when, and on what terms they offer the use of their facilities to other carriers or act as aggregators of traffic from other carriers;

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<sup>19</sup> See 16 FCC Rcd at 21357, ¶ 4 (authorizing NASUCA to review line-count information



- Complete data, broken down by MSA, on the number of lines they serve using (a) their own facilities; (b) the facilities of third-party carriers; or (c) special-access facilities.

At a bare minimum, the Commission should issue an order requiring that all CLECs make available to ILECs all the information relevant to these categories that the CLECs *already produced* in discovery or otherwise provided in the state proceedings undertaken pursuant to the *Triennial Review Order*. The ILECs would then be able to utilize these materials (subject to an appropriate protective order) in their comments and other filings in this proceeding.<sup>20</sup>

To ensure that the Commission obtains all the materials it needs to make a lawful impairment determination, it should make clear now that if CLECs do not provide the relevant information, the Commission will take appropriate action. In particular, if CLECs refuse to provide this information, it would be appropriate for the Commission to draw an adverse inference that the data would show that they are not impaired without access to ILEC facilities. As the Commission has explained, “a failure to respond” to a Commission request for information “permits the drawing of an adverse inference as to the issues involved.”<sup>21</sup> The Commission should provide CLECs with every incentive to

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to “evaluat[e] the data and cost studies submitted by price cap LECs”).

<sup>20</sup> Although parties should be free to use all information provided by CLECs during the state impairment proceedings, the Commission should be aware that such information may be of limited value in assessing impairment because most CLECs were less than helpful in providing details of their network deployment and identifying the location of their network facilities. In fact, many CLECs went out of their way to make sure such facts never saw the light of day in the state impairment proceedings, and the Commission should not permit the CLECs to succeed in pursuing a similar strategy in this proceeding.

<sup>21</sup> Memorandum Opinion and Order, *James A. Kay, Jr.*, 13 FCC Rcd 16369, 16373, ¶ 11 (1998).

disclose (subject to protective order) the facts within their control that are relevant to impairment by making clear that it will exercise this power to draw an adverse inference if they fail to do so.

Respectfully Submitted,

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## **CERTIFICATE OF SERVICE**

I, Erin Harte, do hereby certify that on this 17th day of September, 2004, I caused to be served a true and correct copy of the forgoing Emergency Request for Access to CLEC Data Relevant to the Impairment Inquiry by delivering copies thereof by overnight delivery to the following:

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